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No. 90-1963

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1991

NICHOLAS DAMER,
*Petitioner,*

v.

SUPERIOR COURT IN AND FOR
THE CITY AND COUNTY OF SAN FRANCISCO,
*Respondent,*

JOHN C. ELSTEAD, GERALD C. STERNS,
LAW OFFICES OF GERALD C. STERNS,
ELIZABETH WALKER,
LAWYERS MUTUAL INSURANCE COMPANY,
WEIL ADJUSTERS & CONSULTANTS, INC.,
GERSON MEHLMAN, and ROBERT L. DENEBEIM,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Where a state trial court approves a settlement agreement and orders compliance with its confidentiality provisions and determines that extraordinary circumstances require sealing certain documents, can it impose fines totalling $3,000 for contempt against one of the parties' former attorneys when he violates the order willfully and against his former client's wishes?

2. In a state court contempt proceeding, is there a right to a jury trial and cross-examination of "accusers" when the parties and the court make it clear they are considering only monetary penalties rather than imprisonment, and the fine imposed is $3,000?

## LIST OF PARTIES

The only known parties to the current proceeding are those noted on the caption of the petition.

The underlying case out of which the contempt judgment arose included these additional parties:

Plaintiff: MARIA SEWARD SARGENT

Defendants: TAD SHAPIRO
JEANETTE SHIPMAN
WALTER WALKER III

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**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF IN OPPOSITION

Respondent John C. Elstead respectfully requests that this Court deny the petition for writ of certiorari.

## OPINIONS BELOW

Petitioner has filed four notices of appeal and five writ petitions in the California appellate courts, all in the single underlying case. According to his briefs filed in the California courts, petitioner

has also initiated several state bar actions. Two appeals remain pending in the California Court of Appeal. None of petitioner's other appeals or petitions has succeeded.

None of the state court appellate proceedings has generated an opinion.

## JURISDICTION

Petitioner seeks review under 28 U.S.C. section 1257; however, the Court lacks jurisdiction. No substantial federal question has been properly raised and necessarily decided in the state court proceedings.

## STATUTES INVOLVED

Petitioner specifies several provisions of the Constitution. None of these were timely raised in the state court.

## STATEMENT OF THE CASE

### 1. Facts

Petitioner Nicholas Damer is an attorney. Plaintiff Maria Seward, while represented by petitioner, commenced in the Superior Court for San Francisco County the underlying legal malpractice action against attorney John C. Elstead, Gerald Sterns, Law Offices of Gerald Sterns, and attorneys employed in the Sterns office (Walter Walker III, Elizabeth Walker, Tad Shapiro, and Jeanette Shipman); the attorneys' liability insurer (Lawyers Mutual Insurance Company); and the insurance adjusting firm (Weil Adjusters and Consultants, Inc.).

Shortly before trial, petitioner associated attorneys Gerson Mehlman and Robert L. Denebeim as counsel for plaintiff. While plaintiff's case was being presented at trial, the parties participated in a judicially supervised settlement conference. During that conference, which took place over a three-day period from March 7 through March 9, 1990, the parties reached a settlement agreement.

The settlement agreement provided that the terms of the settlement would be confidential, the court file would be temporarily sealed subject to continuing judicial review, and the files of plaintiff's attorney, petitioner Damer, would be deposited with a receiver.[1] The court found good cause for temporarily sealing the file, and approved the terms of the settlement agreement. The court explained that it was protecting the records so that they would remain available to the parties, the attorneys, and any investigating governmental agency. (The sealing order was later modified to provide that only certain specified documents would remain sealed.)

In implementing the parties' settlement the court was simply administering justice and regulating the proceedings before it. The court specifically stated that there was no restraint on petitioner's, or any person's, ability to report unethical conduct to any governmental agency.

Petitioner objected to the terms of the settlement and stated his intention not to comply. During the hearing on March 9, 1990, the court ordered petitioner to comply with plaintiff's wishes and the terms of her agreement with defendants. Petitioner had withdrawn as counsel for plaintiff. Plaintiff continued to be represented by Messrs. Denebeim and Mehlman.

Petitioner violated the order in several ways. For instance, he distributed sealed and confidential information to over sixty attorneys involved in a separate unrelated case in which petitioner was uninvolved and represented no party;[2] he attached sealed and confidential documents as exhibits to a writ petition that he filed without a sealing request in the California Court of Appeal; and

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[1]The evidence supporting the application for contempt included a letter from plaintiff's counsel, Mr. Denebeim, to petitioner explaining the importance of the settlement's provisions to *plaintiff*, petitioner's former client, and informing petitioner that *plaintiff* insisted on the confidentiality provisions. Petitioner's suggestion to the contrary, that his client did not desire the terms of the settlement agreement, is incorrect.

[2]Petitioner explains this distribution was to notify the parties in that unrelated case of petitioner's opinion regarding their attorney's misconduct. (Petition, p. 27)

he failed to relinquish the files as ordered. After an order to show cause and a hearing, petitioner was found in contempt of court based on those three violations. He was not found in contempt for violating a "gag" order by talking to the press. The court and the moving parties made it clear that imprisonment was not being considered as a punishment or sanction. On August 29, 1990, a judgment of contempt, fining petitioner in the amount of $3,000 ($1,000 for each violation), was entered. Petitioner was not imprisoned, and the judgment did not impose such punishment.[3]

Petitioner petitioned the California Court of Appeal for a writ of certiorari reviewing that judgment. That petition was summarily denied on January 24, 1991. Petitioner then petitioned the California Supreme Court for review. That petition was denied on March 28, 1991. Both appellate courts' denials were summary and unpublished.

Petitioner's inclusion of the California Supreme Court's order denying review, rather than the contempt judgment itself, suggests that petitioner seeks review of the California Supreme Court's order. However, the California Supreme Court has entered no judgment, and its declination to review the case is not a reviewable judgment under Section 1257. Accordingly, respondent presumes that petitioner seeks review of the contempt judgment.

**2. How Federal Question Was Presented**

Even assuming that petitioner seeks review of the contempt judgment, there is no timely raised federal question. When petitioner filed a petition for writ of certiorari in the Court of Appeal, challenging the contempt judgment, petitioner did not seek reversal based on any federal statute, constitutional provision, or basis for reversal. (Exhibit A, Table of Authorities)

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[3]Petitioner's intimation that he was, or may be, imprisoned is irrelevant. The possibility that a future order may impose such punishment is speculative, premature and irrelevant to review of the existing judgment. Further, the very brief period of custody to which petitioner alludes (Petition, p. 5) was long before the entry of the contempt judgment that is the subject of the petition.

## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner addresses the purported merits of the case, but does not specify any reasons for this Court's discretionary issuance of a writ of certiorari. This case certainly does not satisfy the standards established in Supreme Court Rule 10, and such a writ should be denied. This Court lacks jurisdiction, the judgment is correct, there is no substantial federal question, the matter concerns findings of fact and does not concern an important question which is the subject of any conflict of decisions.

### 1. The Supreme Court Lacks Jurisdiction

In challenging the contempt judgment, petitioner raised for the first time the federal constitutional provisions he now relies on in his petition for review in the California Supreme Court. He did not raise any of them in the Court of Appeal. (Exhibit A)[4]

The only apparent reference to the United States Constitution in petitioner's brief in the state court of appeal is this single sentence: "The federal Constitution, and related provisions of the California Constitution and the California Penal Code, *guaranteed* Petitioner a jury trial, *even if* the only criminal penalty were a fine, since the criminal charges were *misdemeanors* (see [Calif.] Penal Code §§ 166 and 689.)" (Emphasis in original.) This single reference, in the middle of a brief wholly devoted to state law issues, does not suffice. In *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 549-50 (1987), this Court ruled that it would not review an issue that was first presented in the court of appeal petition for rehearing, despite an allusion to that issue in the original court of appeal brief:

> Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When " ' "the highest state court has failed to pass

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[4]Attached is the Table of Authorities from petitioner's petition for a writ in the California Court of Appeal. It lists the numerous California rules and statutes upon which petitioner relied. It does not include any federal provision.

> upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' "

Similarly, in this case petitioner did not sufficiently inform the California Court of Appeal that it had been presented with a claim subject to this Court's jurisdiction until petitioner filed his brief in the California Supreme Court.

**2. The Judgment Is Correct and Does Not Violate the Constitution**

The contempt judgment is valid and proper. The trial court had jurisdiction to enter the orders, and, after a hearing, determined that petitioner had willfully violated them despite knowledge and ability to comply.

Further, the hearing did not deprive petitioner of any rights under the Constitution. He was not denied access to the court of appeal, as evidenced by his numerous appeals and petitions there. In addition, the Constitution does not guarantee a jury trial in a contempt hearing that results in imposition of a $3,000 fine and no imprisonment. *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975) (right to jury trial does not apply to contempt proceeding resulting in $10,000 fine unaccompanied by imprisonment). Finally, any supposed right to confrontation is irrelevant here. Petitioner submitted a lengthy brief in opposition to the order to show cause, and appeared at the hearing represented by counsel. Both petitioner and his attorney argued extensively. At no point — either in his brief or at the hearing — did petitioner argue that he was somehow being deprived of a right to "cross-examine" his "accusers."

**3. The Petition Does Not Concern An Important Question That Is the Subject of a Conflict of Decisions**

Petitioner was one of three co-counsel representing the plaintiff in the underlying case. Petitioner's client wished to settle the case and keep the matter confidential. The court approved the agreement and ordered petitioner to comply with the agreement his

client had entered. Petitioner willfully refused to do so, and the court adjudged him in contempt. There is absolutely no conflict of decisions or important question presented in this case whatsoever.

Moreover, the decision here — concerning a case where *all* of the involved parties desire a confidential settlement agreement — concerns only these parties. It is not a decision that will affect any other litigants. This case does not warrant issuance of a discretionary writ under Rule 10.

**4. The Petition Concerns a Finding of Fact**

This case concerns a state trial court's factual finding that petitioner willfully violated the court's order sealing certain records and approving the confidentiality provisions of a settlement agreement desired and entered by all of the involved parties, including petitioner's former client. Petitioner, however, despite his client's wishes and best interests, insisted on violating the order and widely distributing information within the sealing and confidentiality order. After thoroughly reviewing the matter, the superior court concluded that petitioner had notice of the order, had the ability to comply with it, and that he violated it willfully.[5] The evidence certainly justified the legal conclusion drawn by the state trial court.

**5. The Judgment Is Supported by an Independent and Adequate State Ground**

The contempt judgment is supported by an independent and adequate state ground. The judgment states that it is based on petitioner's three violations of the provisions of a court order: his refusal to comply with the requirement that he turn over to an independent receiver the file generated in an underlying case, his violation of the confidentiality provisions of his own client's settlement agreement by filing confidential documents that had been sealed by the trial court, and his violation of the confidentiality provisions of his own client's settlement agreement and the

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[5]Petitioner continues to exhibit a disregard for the court's order. By quoting sealed documents in his petition, he effectively circumvents the sealing order upon which the contempt judgment was in part based.

court's order sealing those documents by widely distributing those documents in a separate case. The court's order sealing the documents is a purely state law matter.

The sealing of the court file was ordered only after the parties' showing of extraordinary circumstances and good cause as required by California state law (*Champion v. Superior Court*, 201 Cal.App.3d 777 (1988)) and was determined to be necessary to the state court's administration of justice. In support of such a showing was the adamant request by petitioner's own client, the plaintiff in this matter, that the matter be sealed to prevent distribution of personal information detrimental to her. Petitioner's willful interference with that administration and with the court's respect and dignity, warranted the only punishment imposed, a fine of $3,000. The effectiveness of petitioner's interference is demonstrated by the fact that — because of petitioner's willful violation of the orders which his client supported — the settlement has not been achieved and the settlement funds have been interpleaded until resolution of petitioner's numerous appeals and arguments.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX

Exhibit A Table of Authorities from petitioner's "Petition for Writ of Certiorari, Prohibition, or Other Appropriate Relief," filed in the California Court of Appeal

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